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IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

DAVID M. LANEY, ROBERT L. NICHOLS,
ANNE S. WYNNE, EDDIE SANCHEZ,
AND RUDY LUGO,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Pueblo, a federally recognized Indian tribe, sued to eject state officials from a piece of property formerly used as a highway maintenance facility, contending that defendants' possession constituted a trespass in violation of federal law.

1. Does the Eleventh Amendment bar suits against state officials under *Ex parte Young* to recover possession of property?

2. Does the decision of the Court of Appeals for the Fifth Circuit that Indian tribes cannot recover possession of real property under *Ex parte Young* violate the federal government's trust responsibility to tribes?

3. Does the Indian Non-Intercourse Act of 1834 abrogate states' Eleventh Amendment immunity to suits by Indian tribes to recover possession of tribal lands?

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PETITION FOR WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on January 10, 2000, Appendix at 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

The Order of the United States District Court for the Western District of Texas denying the Motion to Dismiss on Eleventh Amendment grounds is not reported. The decision of the Court of Appeals for the Fifth Circuit reversing the district court's order and dismissing this case on the grounds of state sovereign immunity, Appendix at 1a, is reported at: *Ysleta del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of a Foreign State.

U.S. Const. amend. XIV § 1: . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

25 U.S.C. § 177: No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a

penalty of $1,000.00. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to and adjust with the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

STATEMENT OF THE CASE

The Pueblo alleged that the State of Texas, beginning with a specially incorporated city in 1871, dispossessed the Pueblo of land to which it held recognized title. The Pueblo contended that any transactions in the tribal lands under the scheme by which Texas created fraudulent title-chains were void under the Indian Non-Intercourse Act, 25 U.S.C. § 177. Texas relied upon such a fraudulent title-chain in taking possession of the property it used as a highway maintenance facility, and the Pueblo contended that the state officials were trespassing on tribal lands in derogation of federal law as a part of the continuing fraud. The Pueblo sued in federal court to eject the state officials who responded that the Eleventh Amendment barred the Pueblo's suit. The Court of Appeals for the Fifth Circuit agreed with the state officials, rejecting the Pueblo's argument that it sought appropriate relief under the doctrine of *Ex parte Young* and that Congress abrogated Eleventh Amendment immunity in the Indian Non-Intercourse Act.

ARGUMENT

I. Writ should be granted on the first question because the decision below conflicts with this Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

The Fifth Circuit held that the Pueblo's suit against the state officials to recover possession of the real property could not be maintained under the *Ex parte Young* doctrine because (1) it is a quiet title action and (2) it does not constitute a request for prospective relief. Other Courts of Appeals have reached similar conclusions. See *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), and *Toledo, Peoria & Western R.R. v. Illinois Department of Transportation*, 744 F.2d 1296 (7th Cir. 1994), cert. denied, 470 U.S. 1051 (1985).

These holdings conflict with the applicable decision of this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). In that case, the Tribe sued the State of Idaho and state officials to establish its title and ownership to certain submerged lands underlying navigable waterways within its Reservation, including Lake Coeur d'Alene and various rivers and streams that feed the Lake. The Tribe sought a declaration of possession as against the State officials and an injunction prohibiting the officials from regulating or interfering with the Tribe's possession, as well as an invalidation of all state laws regulating the area.

A plurality of this Court held that under the particular and special circumstances of the case, the *Ex parte Young* exception was inapplicable because the case was the "functional equivalent of a quiet title action which implicates special sovereignty interests." 521 U.S. at 281. Both the majority and concurring opinions noted the special status of navigable waters and the

state's special sovereignty interests in them.[1] The grounds relied upon by the appellate court below to deny the Pueblo's requested *Ex parte Young* relief are the same grounds urged in the briefs of the petitioner and the amici in *Couer d'Alene*,[2] grounds which this Court refused to adopt; instead this Court focused on the "special sovereignty interests" of the subject property.

Instead of focusing its analysis on the "special sovereignty interests" of the subject property to determine whether *Ex parte Young* relief is available, the appellate court below deleted a whole category of suits previously allowable under the doctrine, suits to recover possession of real property. For good reason this Court chose not to sanction the approach employed by the appellate court below. Absent *Ex parte Young* relief, states are free to ignore the restraints of federal law, including the takings clause of the Fifth Amendment, in their acquisition of property rights. The court in *Ysleta del Sur Pueblo v. Texas*, United States Court of Appeals for the Fifth Circuit, Appeal No. 99-50656, held that the Pueblo's suit for money judgment against the state for a Fifth Amendment taking based on the same allegations as in this case was barred by the Eleventh Amendment.[3]

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[1] See 521 U.S. at 283-287, where this Court gives lengthy consideration to ancient doctrines and concluded that "navigable waters uniquely implicate sovereign interests," tracing the development of this proposition through American water law from early Roman and English principles.

[2] See Brief of Petitioner (1996 WL 290997), pp. 11-18, 36-39; Amici Brief of the States (1996 WL 291048), pp. 13-14; and the Amici Brief of the Council of State Governments, et al. (1996 WL 288987), pp.9-14.

[3] The decision in Appeal No. 99-50656 is subject to a petition for certiorari filed contemporaneously with this petition.

II. Writ should be granted on the second question because the decision below departs from the accepted and usual course of judicial proceedings by denying to Indian tribes *Ex parte Young* relief not denied to others.

The appellate court below also denied the Pueblo's request for *Ex parte Young* relief because the state might lose regulatory control over the property thus, apparently, implicating special sovereignty interests. It is the status of the Pueblo as an Indian tribe that results in any loss of regulatory control by the state over the property. Unless Congress provides otherwise, however, state regulatory control is always diminished over lands held by Indian tribes. Making "loss of regulatory control" the basis for denying *Ex parte Young* relief discriminates against Indian tribes by denying them the access to the federal courts which is available to others.

This Court in *Coeur d'Alene* did not make the status of the petitioner the touchstone for denying *Ex parte Young* relief; instead the court examined the nature of the property in determining whether special sovereignty interests are implicated. In *Coeur d'Alene* the property was the submerged beds and banks of navigable waterways, not, as in the case at bar, a piece of property formerly used as a highway maintenance facility and alleged to be for sale.

The discriminatory effect of the decision violates the federal trust obligation to Indian tribes. It is the law of the land that Indian tribes are to be protected, while in peace, in the possession of their lands. *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543, 591 (1823) (Marshall C.J.). The overall design of the Non-Intercourse Act is to protect the rights of Indians to their properties. *County of Oneida v. Oneida Indian Nation ("Oneida II")*, 470 U.S. 226, 239 (1985), citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). The design includes "put[ting] in statutory form what was or came to be the

accepted rule - that the extinguishment of Indian title required the consent of the United States." *Oneida II* at 240, quoting *Oneida Indian Nation v. County of Oneida ("Oneida I")*, 414 U.S. 661, 678 (1974). The Act applies to states. Oneida I, at 667. The "design" left intact the federal common law right of Indian tribes to sue to enforce their land rights when the accepted rule is violated. *Oneida II* at 240. The Indian Non-Intercourse Act is the federal government's codification of its trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. Denial of Ex parte Young relief by the appellate court below based on the status of the Pueblo vitiates, rather than fulfills, the trust responsibility encompassed in the Indian Non-Intercourse Act.

III. Writ should be granted on the third question because the Fifth Circuit's application of modern Eleventh Amendment jurisprudence principles to the Indian Non-Intercourse Act violates the federal government's trust obligation to Indian tribes.

Recent decisions by this Court narrowly circumscribe the ability of Congress to abrogate Eleventh Amendment immunity: Congress must unequivocally express its intent to abrogate, *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 478 (1987); Congress possesses power to abrogate Eleventh Amendment immunity under section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1975), but not under Article 1 of the Constitution, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); and, Congress must identify the conduct transgressing the Fourteenth Amendment's substantive provisions and tailor its legislative scheme to remedying or preventing such conduct, *Florida Prepaid Post secondary Education Expense Board v. College Savings Bank*, __ U.S. __, 119 S. Ct. 2199, 2207 (1999). Application of these principles to the Indian Non-Intercourse Act, enacted more than 150 years earlier, is inappropriate. As stated above, the Indian

Non-Intercourse Act codifies the federal government's trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. The power of the federal government to deal with Indian tribes, and with those who deal with the tribes, arises from this trust obligation:

> . . . . Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (emphasis in the original). At the time Congress enacted the Indian Non-Intercourse Act,[4] it had the obligation and the power to protect Indian tribes in the peaceful enjoyment of their lands. At the time Congress enacted the Indian Non-Intercourse Act, this Court had twice ruled that states cannot assert the defense of sovereign immunity from suit to defeat the jurisdiction of federal court. *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793)

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[4] See 1 Stat. 137, Act of July 22, 1790, § 4; 1 Stat. 469, Act of May 19, 1796, § 12; 1 Stat. 743, Act of March 3, 1799, § 12; 2 Stat. 139, Act of March 30, 1802, § 12; 4 Stat. 729, Act of June 30, 1834, § 12, now codified at 25 U.S.C. § 177. "[T]he Statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. See 25 U.S.C. §177." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 n. 16 (1985) ("*Oneida II*").

(pre-Eleventh Amendment), and *Cohens v. Virginia*, 19 U.S. (Wheat.) 264, 412 (1821) (post-Eleventh Amendment). At the time Congress enacted the Indian Non-Intercourse Act, it was not required to unequivocally express its intent to abrogate Eleventh Amendment immunity -- an immunity this Court would not find until the year 1890. *Hans v. Louisiana*, 134 U.S. 1 (1890).

At the time Texas is alleged to have violated the Indian Non-Intercourse Act in 1871, Congress possessed power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity (which, at the time, did not exist), but Congress did not know, and would not know for 125 years, section 5 provided its only power to abrogate Eleventh Amendment immunity. At the time Texas is alleged to have violated the Indian Non-Intercourse Act, Congress did not know, and would not know for 126 years, of its "identify and tailor" requirements in legislating pursuant to section 5 of the Fourteenth Amendment.

Application of modern Eleventh Amendment jurisprudence principles to the Indian Non-Intercourse Act judicially exempts acts of states from that specific piece of legislation designed to fulfill the federal government's trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. By suggesting that Congress, on the eve of the 21st century, can amend the Indian Non-Intercourse Act to comply with modern Eleventh Amendment jurisprudence principles, the Fifth Circuit sweeps under the rug of history last century' racially-motivated policies of genocide by which Indian tribes were dispossessed of their lands by states. The failure of the Fifth Circuit to find abrogation of Eleventh Amendment immunity in the Indian Non-Intercourse Act marks yet another broken promise of the federal government to protect the lands of Indian tribes. Will this Court allow the Courts of Appeals to be the instrument that

breaches the trust relationship between the federal government and the Indian tribes?

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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